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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ADOLPH WORTHY,

Defendant and Appellant.

2d Crim. No. B159620
(Super. Ct. No. BA213773)
(Los Angeles County)

Adolph Worthy appeals a judgment after his conviction of assault with a deadly weapon by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)), a felony, with findings that he had two prior serious felony convictions for forcible rape and attempted murder (Pen. Code, §§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). The court sentenced him to 30 years to life in state prison. We conclude the court did not err by not instructing the jury on the lesser included offense of simple assault, and Worthy's sentence was not cruel and unusual punishment. We affirm.

FACTS

Worthy approached Jesse Thomas and told him the shopping cart he had was his. Thomas disagreed. Thomas testified that Worthy then "picked up a board" and hit him in the head with it "about four or five times." Thomas fell to the ground.

Abdullah Alim testified he saw Worthy hit Thomas with his fist "in the side twice," but Thomas did not fight back. Then "Worthy picked up . . . a pallet board and . . . hit [Thomas] on the side of the head with it twice." When Thomas fell to the ground, Worthy struck him with the board "three or four times." Alim called an ambulance because Thomas was "lying on the ground bleeding" and not moving. The police did not find the board Worthy used. At a later time, Alim found a similar board with nails in it. This board was introduced into evidence. Alim testified the board Worthy used also had nails in it.

Police officer Mario Morales testified that a "pallet board" is a piece of wood approximately one inch thick, four-to-six inches wide, and three-to-four feet long. He interviewed Thomas and Alim, but his report did not mention that they said the board had nails in it.

In the defense case, David Raya, a paramedic, testified that Thomas was bleeding from the head, and had a laceration to his left flank area and pain to the cervical neck area. Raya determined that Thomas had "suffered blunt trauma" head injuries which required that he be transported to a hospital. Thomas was conscious during the ambulance trip to the emergency room.

Detective Gregory Whorton interviewed Thomas in the hospital two days later and he did not mention that the board had nails in it.

The court did not instruct the jury on simple assault. At sentencing, it did not strike one of Worthy's prior strike offenses.

DISCUSSION

Instructing on the Lesser Included Offense of Simple Assault

Worthy contends that the trial court erred by not instructing the jury on the lesser included offense of simple assault. We disagree.

The trial court has a sua sponte duty to instruct the jury on lesser included offenses. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.) Assault under Penal Code "[s]ection 245, subdivision (a)(1), punishes assaults committed . . . 'with a deadly weapon or instrument other than a firearm,' or by 'any means of force likely to produce

great bodily injury.'" (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Simple assault is a lesser included offense. (*People v. Berry* (1976) 18 Cal.3d 509, 519.) But "[t]he trial court may properly refuse to instruct upon simple assault where the evidence is such as to make it clear that if the defendant is guilty at all, he is guilty of the higher offense [felonious assault].'" [Citation.] (*Ibid.*) "[I]f the evidence shows without conflict the use of a deadly weapon . . . the law is clear that no instruction on misdemeanor assault is necessary[.] [Citations.]" (*People v. Cooper* (1968) 268 Cal.App.2d 34, 36; see also *People v. Whitsett* (1983) 149 Cal.App.3d 213, 221.)

Worthy contends the board was not a deadly weapon, and whether it had nails was in dispute. But with or without nails, it was undisputed that Worthy used the board as a deadly weapon by striking Thomas on the head with it. (*People v. Copeland* (1958) 157 Cal.App.2d 185, 187 [one-foot wooden club was a deadly weapon where defendant hit victim on the head with it]; see also *People v. Jaramillo* (1979) 98 Cal.App.3d 830, 837.)

Worthy contends that Thomas' injuries were not serious and the force used was not likely to result in great bodily injury. We disagree. Thomas was bleeding from the head, had a laceration to the left flank, suffered "blunt trauma," and had pain to his cervical neck area. Raya determined that Thomas had to be hospitalized because of his head injuries..

Moreover, the force used was likely to cause great bodily injury. Worthy hit Thomas with a three-to-four feet long wooden board four to six times, and struck him with it at least twice on his head. (*In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1162 [single fist blow from "slight" built 13-year-old boy to adult victim's face which knocked her down and required five-hour hospital stay established force likely to produce great bodily injury]; *People v. Jaramillo, supra*, 98 Cal.App.3d at p. 837 [20-inch stick was a deadly weapon likely to cause great bodily injury where mother hit children's arms and buttocks with it causing abrasions and swelling].) The weapon used and blows by Worthy were more dangerous than those in *Nirran W.* and *Jaramillo*. The court did not

err because "[t]here was no evidence in the record which would have supported simple assault." (*People v. Berry, supra*, 18 Cal.3d at p. 519.)

Cruel and Unusual Punishment

Worthy contends that his three strikes life sentence is cruel and unusual punishment. We disagree. (*Lockyer v. Andrade* (2003) 123 S.Ct. 1166.)

The judgment and sentence are affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Paul Enright, Temporary Judge
Superior Court County of Los Angeles

Cheryl Barnes Johnson, under appointment by the Court of Appeal, for
Defendant and Appellant.

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